

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 01-70

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Background

This is the second motion to compel filed by SELP with regard to Fibertech's failure to respond to information requests, the responses to which are absolutely essential to a fair and timely resolution of Fibertech's Complaint. Specifically at issue in this motion to compel, and as set forth in SELP's November 20, 2001 motion to compel responses to certain information requests in SELP's first round of requests (hereinafter, "November 20th Motion"), is Fibertech's refusal to produce copies of leases that it relies upon in the testimonies of two separate witnesses—Frank Chiaino and Scott Lundquist. Fibertech has represented to the DTE and to SELP that it is a "dark fiber leasing company." Complaint, ¶4. Fibertech's witnesses have testified that Fibertech has a signed "Master Agreement" with Choice One Communications, which Mr. Chiaino refers to as "Fibertech's anchor tenant." Chiaino Testimony, p. 4, starting at line 9. Fibertech, through its witness Mr. Lundquist, provides additional testimony on this same "Master Agreement" by testifying that under said agreement, "Choice One will obtain a 20-year lease for dark fiber from Fibertech in at least thirteen cities." Lundquist Testimony, p. 20, lines 12-14. Fibertech refers to the Choice One agreement, and agreements with other companies, such as CTC, AT&T, Qwest, Allegiance, Global Crossings, Connecticut Telephone and the State of Connecticut as examples of Fibertech's current "customers" (Chiaino Testimony, p. 4, lines 12-14) and to show that Fibertech's dark fiber is allegedly used in the provision of "competitive telecommunications services in Massachusetts." Lundquist Testimony, p. 19, starting at line 13. Accordingly, these documents go to the heart of this dispute. To date, Fibertech has not produced one such agreement or lease— not even a redacted version pursuant to a confidentiality agreement.

Argument in Support of Motion to Postpone Evidentiary Hearings

In short, SELP and the DTE are being asked to accept on “blind faith” that Fibertech engages in the transmission of intelligence by telephone, electricity or otherwise, or in the transmission of cable television signals, merely by virtue of the existence of agreements Fibertech has with its “customers.” (Fibertech also refuses to provide any documents concerning its alleged “local exchange, voice, interexchange and data services” customers, or any information regarding its supposed plans to offer local exchange voice and data services, or cable television service as “market conditions and economics” dictate, as set forth in SELP’s November 20th Motion.) Fibertech’s position on these requests— essentially, that SELP and the DTE must simply rely, without the benefit of any discovery, upon Fibertech’s vague representations that somewhere out there, Fibertech has signed agreements with different companies and states in which Fibertech will presumably provide said companies and states with something— constitutes a total abdication by Fibertech of its burden of proof and production in this case. As the complainant, Fibertech has the burden of presenting sufficient information and evidence to support all the factual allegations in its complaint. Hearing Officer’s Ruling on Procedural Schedule and Petition to Intervene, D.T.E. 01-70, at 3 (October 26, 2001). Since its complaint states that Fibertech is a company entitled to attach to SELP’s poles as a “licensee,” Fibertech has the burden of proving that it is in fact, a “licensee.” It is not SELP’s task to prove Fibertech is not a licensee. If Fibertech alleges that the existence of “agreements” with customers, and its ability to provide “local exchange” and similar services to customers in Massachusetts at this time support its claims that it is a “licensee” entitled to access SELP’s poles under G.L. c. 166, § 25A, then it must “present sufficient information” to support these allegations or face dismissal of its complaint against SELP.

As a result of Fibertech's complete failure to provide information on the documents it states support its case, SELP is left with nothing upon which to conduct cross-examination of Fibertech's witnesses, and SELP is left without the ability to examine nearly all of the documents that constitute Fibertech's "evidence" that it relies on in its pre-filed testimony in support of its complaint before the DTE. Fibertech seeks to deny discovery by SELP on the very documents that it has placed into issue through its prefiled testimony in support of its case. Under such conditions, the dictates of due process would require at a minimum, the postponement of evidentiary hearings at least until such time as these discovery disputes are resolved, and until such time as SELP receives enough of the documents requested to be able to develop a meaningful defense of Fibertech's claims.² If SELP does not receive any documents, then it should be granted leave to file a motion to dismiss Fibertech's complaint.

Argument on (Second) Motion to Compel

In the interests of administrative economy and efficiency, SELP will refer to and incorporate by reference, where appropriate, the legal and factual arguments set forth in its November 20, 2001 Motion to Compel Responses to Information Requests..

Information Request

SELP 2-6: Please provide a copy of Choice One's "Master Facilities Agreement" with Fibertech referred to on page 20 (starting at line 12) of Mr. Lundquist's testimony.

RESPONSE: Fibertech objects to producing this lease on the grounds that it is irrelevant to the issues in dispute and that the lease is competitively sensitive and therefore confidential. The lease is for dark fiber, and since there is no dispute that Fibertech is a dark fiber carrier and it is SELP's position that a dark fiber carrier is not a "licensee" within the meaning of G.L. c. 166 § 25A, the lease is therefore

² Moreover, in its responses to SELP 2-1 and SELP 2-5, Fibertech declines to provide clearly relevant information and instead offers SELP and the Department the opportunity to review such information at its witness' offices. Should SELP decide to avail itself of this opportunity, the delay associated with accessing information in this manner further justifies a postponement of the start of evidentiary hearings in this docket.

immaterial. In this light, the burden of seeking protective treatment or obtaining authorization from Fibertech's customers to produce outweighs any marginal probative value of the lease. Fibertech further objects to producing the lease of a customer that does not do business in Massachusetts.

Legal/Factual Argument

SELP repeats and incorporates by reference the arguments made in its November 20th Motion with regard to Fibertech's refusal to respond to SELP 1-6. SELP further adds that Mr. Lundquist cites the Choice One "Master Facilities Agreement" in his testimony to support Fibertech's contention that "dark fiber is being used to provide competitive telecommunications services in Massachusetts." Lundquist Testimony, p. 19, starting at line 13. The centrality of this agreement to Fibertech's arguments cannot be overstated: it underlies the basis of its claims that it provides a telecommunications service. SELP and the Department are entitled to review this agreement. Clearly, the agreement will contain information relevant to this dispute.

Information Request

SELP 2-12: Please refer again to Mr. Chiaino's testimony at page 4. Please provide copies of Fibertech's agreements with Choice One, AT&T, Qwest, Allegiance, CTC, Global Crossings, Connecticut Telephone, and the State of Connecticut

RESPONSE: Fibertech objects to producing such leases on the grounds that they are irrelevant to the issues in dispute and that certain of these leases are competitively sensitive and therefore confidential. These leases are for dark fiber, and since there is no dispute that Fibertech is a dark fiber carrier and it is SELP's position that a dark fiber carrier is not a "licensee" within the meaning of G.L. c. 166 § 25A, the leases are therefore immaterial. In this light, the burden of seeking protective treatment or obtaining authorization from Fibertech's customers to produce outweighs any marginal probative value of these leases. Fibertech further objects to producing leases of customers that do not do business in Massachusetts.

Legal/Factual Argument

SELP repeats and incorporates by reference its legal and factual argument in support of compelling a response to SELP 2-6, above. SELP further adds that if none of these Fibertech customers do business in Massachusetts, then SELP is hard-pressed to comprehend why such leases are relevant to Fibertech's claims that it is somehow developing competitive telecommunications services in Massachusetts. In short, Fibertech has been hoisted by its own petard: either the leases are relevant to this proceeding and Fibertech's claims or they are not, but such determination cannot be

made by Fibertech alone. They cannot be put into issue in this proceeding by Fibertech's own witnesses and then hidden from view of the Department and SELP.

Fibertech's Opposition to Motion to Compel

Finally, immediately prior to filing this second motion to compel, SELP received Fibertech's Opposition to SELP's first motion to compel. Because Fibertech's arguments in its Opposition have implications for this second motion to compel, SELP notes the following:

- ?? Fibertech continues to ignore the important difference between information which is relevant and information which is discoverable. Rather than address SELP's arguments and cited DTE precedent on this issue (SELP November 20, 2001 Motion to Compel at 3), Fibertech argues in its Opposition – notably without citation of any precedent supporting its argument -- that “SELP does not make any concrete demonstration of how the information sought by the requests is relevant.” Opposition at 3. Such a demonstration of relevancy at this stage of the proceeding – concrete or otherwise – is simply not required.
- ?? In its first Motion to Compel, SELP consistently points out that much of the information sought by the disputed information requests is information that is discussed in the prefiled direct testimony of Fibertech's witnesses. In its Opposition, Fibertech states that “[S]imply because customers or plans are mentioned in Mr. Chiaino's testimony as background explanation of Fibertech's business plan as a dark fiber carrier does not make them relevant for discovery.” Opposition at 4. In addition to once again ignoring the difference between relevancy and discoverability during this stage of the proceeding, Fibertech appears to believe that some elements of a witness' prefiled direct testimony, *i.e.*, “background explanation”, are somehow not subject to discovery. Of course, there is no such “background” exemption. As parties to DTE proceedings are well aware, a witness must be prepared to provide discovery responses which “back up” *any and all* statements in prefiled direct testimony.
- ?? Finally, Fibertech fails to address a number of issues associated with the alleged competitively sensitive nature of the requested documents. First, even if SELP were a competitor of Fibertech, as Fibertech alleges in its Opposition at page 5, SELP fails to understand how it possibly could compete with Fibertech in places like New York and Pennsylvania.³ Moreover, Fibertech alleges that “as SELP acknowledged by agreeing to a protective order, the information it seeks requires the additional administrative burden of protective treatment with no material gain to any fact finding that may be necessary.” Opposition at 5. Of course, SELP acknowledged no such thing. Consistent with the Department's practices and procedures, SELP expressed its willingness to execute a non-

³ Further, any concerns regarding SELP, as a so-called competitor, gaining access to this competitively sensitive material could be alleviated by executing a non-disclosure agreement which only allows SELP's attorneys and consultants to review the requested information.

disclosure agreement as a means of obtaining necessary information in a manner that does not delay the procedural schedule in this case.

CONCLUSION

In the end, the issues raised by these discovery disputes are rather straightforward. Fibertech is the Complainant in this case and clearly carries the burden of proof and production. From the outset, in responding to Fibertech's Complaint, SELP has consistently raised questions regarding the nature and scope of Fibertech's business, products, services, and customers. SELP has consistently raised questions regarding whether Fibertech is a "licensee" under G.L. c. 166, § 25A and whether Fibertech transmits intelligence by electricity, telephone or otherwise, or cable television signals, and its discovery is entirely consistent with SELP's "position" in this case.

Fibertech has consistently resisted SELP's efforts to learn anything about the nature of Fibertech's business, products, services, customers and the "transmission of intelligence." Although Fibertech employs different methods to avoid providing critical information to SELP and the Department, *i.e.*, claiming the information sought is burdensome, irrelevant, proprietary, calls for a legal conclusion, or is somehow protected from discovery because of legal positions taken by SELP in its Reply, it really all comes down to the same thing – Fibertech believes it can prevail in this proceeding without providing any evidence other than vague generalities regarding the nature of its business, products, services, and customers.

While complainants in pole attachment cases are entitled to a resolution of their complaints in a timely manner, complainants also bear the responsibility to provide the Department and intervenors with the evidence necessary to resolve their complaints. Here, Fibertech has utterly failed to provide necessary information. The postponement in evidentiary

hearings sought by SELP could have been avoided if Fibertech had provided the very basic information sought by SELP – information that goes to the heart of Fibertech’s Complaint.

Respectfully submitted,

SHREWSBURY’S ELECTRIC LIGHT PLANT

By its attorneys

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CERTIFICATE OF COMPLIANCE

I, Diedre Lawrence, counsel for Shrewsbury’s Electric Light Plant, do hereby certify that on November 19 and November 20, 2001, (at approximately 2:30 p.m. on both occasions) initiated telephone conferences with Cameron Kerry, Esq., and Kimberly Collins, Esq., counsel of record for Fiber Technologies Networks, LLC, (and have again spoken with Cameron Kerry, Esq. on at least two subsequent occasions on November 28, 2001) for the purpose of attempting to narrow areas of disagreement on the very same discovery matters involved in this second motion to compel, and that, despite the good faith efforts of the parties, no resolution has been reached as of the date of this second motion.

Diedre T. Lawrence